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ENVIRONMENTAL PROTECTION  
LAND USE MANAGEMENT AND COMPLIANCE  
LAND USE REGULATION PROGRAM  
Freshwater Wetlands Protection Act Rules

Proposed Amendments: N.J.A.C. 7:7A-4.3, 5.6 and 5.27

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 13:9B-1 et seq., N.J.S.A. 58:10A-1 et seq.

DEP Docket Number: 17-01-08/276

Proposal Number: PRN 2001-

**A public hearing on the proposal will be held as follows:**

September 27, 2001  
1:00 p.m.  
New Jersey Department of Personnel Multi-Purpose Room, First Floor  
44 South Clinton Avenue  
Trenton, New Jersey

Submit written comments by the close of business on October 4, 2001 to:

Janis Hoagland, Esq.  
Attn: DEP Docket Number **17-01-08/276**  
Office of Legal Affairs  
New Jersey Department of Environmental Protection  
P.O. Box 402  
Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on 3½ inch diskettes as well as on paper. The Department will be able to upload the comments onto its office automation equipment and will avoid having to retype the comments. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully. Submittal of comments on diskette is not a requirement. The Department prefers Microsoft Word 6.0 or above; however, other word processing software that can also be read or used by Microsoft Word 6.0 is acceptable. MacIntosh formats should not be used.

The proposal can be viewed or downloaded on the Land Use Regulation Program website at <http://www.state.nj.us/dep/landuse>. A copy of the proposal is also available on paper or on disk by e-mailing the Department at [lurweb@dep.state.nj.us](mailto:lurweb@dep.state.nj.us), or by calling the Department at (609) 984-3444.

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The agency proposal follows:

### **Summary**

The Department of Environmental Protection (Department) is proposing several amendments to the Freshwater Wetlands Protection Act (FWPA) rules, N.J.A.C. 7:7A. Two of these proposed amendments were requested by the United States Environmental Protection Agency (EPA) in order to ensure that the FWPA rules are as stringent as Federal wetlands rules. The other proposed amendments prohibit the use of general permits to authorize activities in vernal habitats.

On March 2, 1994, the Department assumed responsibility in most of New Jersey for the Federal wetlands permitting program, also known as the "Federal 404 program" because it stems from section 404(g) of the Federal Clean Water Act, 33 U.S.C. ' ' 1251 et seq. The Federal 404 program had previously been administered in New Jersey by the U.S. Army Corps of Engineers (ACOE). Because the Department has assumed responsibility for the Federal 404 program, the Department's rules must be as stringent as the rules used by the ACOE to administer the Federal 404 program. The United States Environmental Protection Agency (EPA) oversees the Department's wetlands program in accordance with the Federal Clean Water Act and a Memorandum of Agreement between the Department and EPA.

A readoption with amendments of the FWPA rules is published elsewhere in this issue of the New Jersey Register. The Department published the proposed readoption with amendments of the FWPA rules on August 7, 2000. Shortly before the proposal was finalized, the ACOE adopted amendments to the Federal 404 program rules for Nationwide Permits, which reduced limits on allowable disturbance. After the proposal was published, the U.S. Environmental Protection Agency (EPA) requested two substantive changes to the rules, in order to ensure that the Department's rules remain as stringent as the Federal 404 program. In addition, public comments on the proposed readoption pointed out that provisions intended to protect vernal habitats were insufficient to fully accomplish the intended protection. The changes necessary to address EPA's concerns and to revise the provisions regarding vernal habitats could not be made on adoption. Therefore, the Department has readopted the rules and is concurrently proposing to amend the rules in accordance with EPA's request. In addition, an amendment is proposed to more effectively protect important vernal habitat.

## **SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS**

### **7:7A-4.3 Conditions that apply to all general permit authorizations**

Proposed new N.J.A.C. 7:7A-4.3(b)16 prohibits the use of any general permit in a vernal habitat, or in a transition area adjacent to a vernal habitat. The Department adopted such a limit on general permit 6 in the readoption of the FWPA rules found elsewhere in this issue of the New Jersey Register. This limit was imposed on general permit 6 (which allows disturbance of isolated, or non-tributary, wetlands) because vernal habitats are by definition non-tributary wetlands. However, commenters on the proposal pointed out that an applicant who could not disturb a vernal habitat under general permit 6 could still obtain general permit authorization to disturb the wetland for

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a variety of activities covered by other general permits. Therefore, in order to more effectively protect vernal habitats, the Department is proposing to add a comprehensive prohibition on the use of any general permit in a vernal habitat. An individual permit would still be available for an activity in a vernal habitat, but would require an alternatives analysis and mitigation.

A vernal habitat is a small (usually less than an acre), temporarily ponded or otherwise fish-free depression not connected to a flowing stream system. Water is supplied by surface runoff and/or ground water. Various studies have identified vernal habitat as ecologically important because it performs the following functions:

- supports a unique ecological community with high species diversity;
- supports species that act as indicators of environmental changes due to their rapid life cycle;
- supports certain amphibians, some of which are endangered or rapidly declining;
- eliminates fish and other predators through drying up each year, so that when the pond fills, tadpoles can survive free of predators;
- stimulates rapid growth and high population densities in amphibians after seasonal flooding;
- scatters pockets of water widely across the landscape to supply drinking water for many types of wildlife;
- provides foraging and nesting habitat for a variety of birds; and
- allows some species, such as crayfish and some salamanders, to survive dry periods by burrowing into the bottom and waiting until rain again fills the pond.

In New Jersey, an estimated 28 reptiles and amphibians use vernal habitat. Of these species, five are endangered, two threatened, and five are listed as declining (Declining species are those which are likely to become endangered unless conditions change.) For the five endangered species, the major reason they are endangered is loss of habitat.

In order to implement the prohibition against using general permits in vernal habitat, the Department is developing a comprehensive list of vernal habitats which have been determined by the Department to meet the definition of a vernal habitat at N.J.A.C. 7:7A-1.4. The Department has already compiled approximately 4200 records of vernal habitat species in New Jersey. The Department will make the list of such areas, termed "certified vernal habitats" available to the public via the LUR website at [www.state.nj.us/DEP/landuse](http://www.state.nj.us/DEP/landuse) by September 4, 2001. If a site is listed as a vernal habitat or if evidence of an onsite vernal habitat is obtained during application review, no general permit authorizations would be issued for activities on that site, unless the applicant could demonstrate that the area is no longer suitable for vernal habitat species. If an area is not on the list, the Department will presume that the area is not vernal habitat. However, if evidence that an area is a vernal habitat is received by the Department after submittal of an application for regulated activities in the area, the Department would investigate the evidence and the area prior to making a final decision on the application. The list of certified vernal habitats will be updated on an ongoing basis as more data are collected and more vernal habitats are certified. The Department believes that the proposal appropriately balances protection of this important

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environmental resource with the goal of minimizing the regulatory burden on the applicant.

## SUBCHAPTER 5 ADOPTED GENERAL PERMITS

### 7:7A-5.6 General Permit 6 – Non-tributary wetlands

Changes are proposed at N.J.A.C. 7:7A-5.6(b) to reduce the acreage of disturbance authorized under general permit 6 in "waters of the United States" to one half acre, in order to ensure that the Department's wetlands program is as stringent as the Federal wetlands program. In 1994, New Jersey assumed the responsibility for freshwater wetlands permitting from the U.S. Army Corps of Engineers (ACOE) pursuant to the Federal Clean Water Act. Since this assumption, New Jersey's program operates in place of the Federal 404 program throughout the State, except in the Hackensack Meadowlands, and in interstate and navigable waters and adjacent wetlands enumerated in the Department's Memorandum of Agreement with the ACOE. The EPA oversees New Jersey's assumed program, and also the ACOE program in the above mentioned areas still regulated by the ACOE. In order to maintain its assumption of the wetlands program, the Department must demonstrate to EPA that any rules it adopts are at least as stringent as existing Federal wetlands regulations.

The Federal regulatory provisions that correspond to general permit 6 are NWPs 29, 39, and 42, which authorize construction of a single family home; construction of a residential, commercial or institutional development; and construction of a recreational facility, respectively. Each of these NWPs now authorizes ½ acre of disturbance of a water of the United States, whereas general permit 6 authorizes one acre of disturbance of a freshwater wetland, transition area, and/or State open water. The Department regulates all "waters of the State," which include waters of the United States. In a recent U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 US 159, 121 S. Ct. 675, 148 L Ed. 2d 576 (January 9, 2001) (SWANCC), the Supreme Court held that ACOE's interpretation of "waters of the United States" to encompass certain isolated waters was too broad and not consistent with the Federal Clean Water Act.

The SWANCC holding creates an uneven result when comparing general permit 6 to the corresponding NWPs. If a project disturbing one acre were proposed in a water of the United States, the entire project would be authorized under general permit 6 but only one half acre of the project would be authorized under the corresponding NWPs. This would render general permit 6 less stringent than the NWPs as applied to this project. If the same project were proposed in a wetland that is not a water of the United States, the project would not be regulated at all under the Federal wetlands program, rendering general permit 6 more stringent than the corresponding NWPs. The changes proposed herein will cap disturbances in all waters of the United States under general permit 6 at one half acre.. Note that, under the definition of "waters of the United States" at N.J.A.C. 7:7A-1.4, both wetlands and open waters can be waters of the United States. This one half acre limit will ensure that the general permit will always be

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at least as stringent as the Federal NWP's, and will ensure that the Department can retain its assumption of the Federal wetlands program. For projects in waters or wetlands that are not waters of the United States, and for projects in transition areas, the current one acre limit on disturbances under general permit 6 will apply.

A prohibition on the use of general permit 6 in a vernal habitat at N.J.A.C. 7:7A-5.6(c)5 is proposed for deletion, because, as explained above, it will be replaced by a similar proposed prohibition that applies to all general permits, found at N.J.A.C. 7:7A-4.3(b)16.

#### 7:7A-5.27 General permit 27 – Redevelopment of previously disturbed sites

General permit 27 authorizes redevelopment of an area degraded by previous human disturbance. An amendment is proposed to N.J.A.C. 7:7A-5.27(c) to limit disturbance under general permit 27 to one half acre in waters of the United States. This change is proposed for the same reasons as the similar proposed change to general permit 6, and was requested by EPA to ensure that the general permit is as stringent as the corresponding Federal provisions.

One of the problems the general permit is intended to address is the situation where a site is dotted with small depressions created by previous development and poor grading. These small depressions tend to develop wetlands characteristics over time after a developed property is abandoned. Because these small wetlands are scattered around a site, they can be a major obstacle to development because they break up the developable area on the site into small pieces. The ability to fill these small wetlands can make the site usable for redevelopment because this allows disturbance of one large portion of the site rather than many small portions.

Proposed new N.J.A.C. 7:7A-5.27(e) is relocated from the last sentence of existing N.J.A.C. 7:7A-5.27(c), in order to make the rule easier to follow. The provision states that disturbances authorized under general permit 27 do not count toward the one acre cumulative disturbance allowed under multiple general permits.

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### Social Impact

The proposed change limiting disturbances under general permit 6 to one half acre in a water of the United States will have a positive social impact in that it will ensure that the Department retains assumption of the Federal 404 program, which provides a unified wetlands permitting system for most of New Jersey. Further, the proposed amendment will narrow the class of wetlands eligible for disturbance under general permit 6. This will increase protection for crucial natural resources that contribute to the public health and the health of the environment.

The proposed prohibition on the use of general permits in vernal habitats (found at proposed N.J.A.C. 7:7A-4.3(b)16) will have a positive social impact because it will protect the breeding areas for many species of amphibians that, while not currently endangered, are diminishing rapidly. Without this prohibition, it is likely that at least some of these species will become endangered.

The proposed changes to general permit 27 (N.J.A.C. 7:7A-5.27(c) and (e)) may have a slight negative social impact in that they will somewhat reduce the likelihood that degraded, previously developed sites will be redeveloped. However, any impact the proposed change does have will be offset by the positive social impact that will result from the fact that the changes will ensure that the Department's rules are sufficiently stringent to allow the Department to continue to administer the federal 404 program in New Jersey.

### Economic Impact

The economic impact of these proposed amendments to the FWPA rules will be minor. The proposed changes to general permit 6 are likely to have a slight negative economic impact on persons who want to develop property containing wetlands that are not part of a surface water tributary system but that are classified as waters of the United States. However, this is a small class of properties, and the impact will be slight because these properties would still be eligible for development under other general permits. Further, development of these sites could be subject to a dual wetland permitting system (Federal and State) without this change, which would increase costs.

The proposed prohibition on the use of general permits in vernal habitats (found at proposed N.J.A.C. 7:7A-4.3(b)16) will have a short term negative economic impact on developers and property owners, in that it will prevent development in some small isolated wetlands under various general permits. An individual permit might still be available for these activities, but is much harder to obtain and requires more time and expense. However, many species that use vernal habitats are decreasing rapidly. If protecting vernal habitat can prevent these species from becoming threatened or endangered, this will avoid even stricter future regulation in areas where these species



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are found. These stricter requirements would have a greater economic impact than the prohibition on use of general permits in areas of vernal habitat.

The proposed changes to general permit 27 (N.J.A.C. 7:7A-5.27(c) and (d)) may have a negative economic impact for developers of "brownfield" sites, in that it will somewhat reduce the amount of disturbance allowed in wetlands on such sites. However, the proposed changes were requested by EPA in order to ensure that the Department can retain its assumption of the Federal 404 program. This assumption is important to reduce costs for all applicants and for the Department. Thus, the negative economic impact of the proposed changes are offset by the positive economic impact of the Department's ability to retain assumption of the Federal program. Further, development of these sites could be subject to a dual wetland permitting system (Federal and State) without this change, which would increase costs.

### Environmental Impact

The changes proposed herein will have a positive environmental impact. The proposed changes to general permit 6 will have a positive environmental impact in that they will narrow the class of wetlands eligible for disturbance under general permit 6. General permit 6 is the general permit that has historically accounted for the greatest acreage of wetlands disturbance among the Department's general permits. Narrowing general permit 6 in this manner will increase protection for crucial natural resources that contribute to the public health and the health of the environment.

The proposed prohibition on the use of general permits in vernal habitats (found at proposed N.J.A.C. 7:7A-4.3(b)16) will have a positive environmental impact. Recent research has shown that vernal habitats are much more environmentally important than previously understood. The proposed prohibition against the use of general permits in vernal habitats will improve protection of these important features.

The proposed changes to general permit 27 (N.J.A.C. 7:7A-5.27(c) and (d)) will have a slight positive environmental impact in that they will reduce the acreage of disturbance under the general permit. Narrowing general permit 27 in this way will increase protection for natural resources that provide environmental benefits.

### NEPPS Statement

Proposed FWPA rule amendments in light of the Department's  
Strategic Plan and the National Environmental Performance Partnership System

The 1998-2001 NJDEP Strategic Plan reflects the Department's vision, mission and six broad goals. The goals relating to the Land Use Regulation Program are contained within the Healthy Ecosystems goal area in the Strategic Plan. The goal for Healthy

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Ecosystems is broad based and involves a number of programs throughout the Department. The goal for Healthy Ecosystems is:

- *The health, diversity and integrity of New Jersey's ecosystems will be restored, protected, enhanced and sustained.*

The National Environmental Performance Partnership System (NEPPS) provides a detailed outline of the Department's goals and includes focused milestones, strategies, activities and indicators for each. The Performance Partnership Agreement that is developed every two years under NEPPS serves two purposes: It is a comprehensive, cross-program planning document, providing more detail than the Strategic Plan, and it guides the relationship between the Department and USEPA Region II in federally funded or delegated programs.

The freshwater wetlands permitting program falls under the Land and Natural Resources area in the Performance Partnership Agreement. Within the Land and Natural Resources area, the following four goals are most relevant to the freshwater wetlands program:

- *Subgoal #1: Wetlands: improve quality and function and achieve no net loss. Explore innovative techniques for creation, enhancement, and maintenance of New Jersey wetlands.*
- *Subgoal #2: Headwaters and riparian corridors: maintain and restore headwaters, riparian corridors and associated buffers for water quality and wildlife habitat, flood control, public safety, stream bank stability.*
- *Subgoal #8: Open space: Preserve open space for current and future protection of natural resources, biological diversity, and recreation.*
- *Subgoal #9: Environmentally damaged land: Return environmentally damaged land to productive uses.*  
(1999-2000 PPA)

The proposed amendments to the FWPA rules will serve the above goals in the following ways:

1. The proposed changes to general permit 6 will decrease loss of wetlands and help preserve open space (subgoals #1 and #8).
2. The proposed prohibition on the use of general permits in vernal habitats (found at proposed N.J.A.C. 7:7A-4.3(b)16) will decrease loss of wetlands (subgoal #1), and will help preserve open space and protect habitat that is important for biological diversity (subgoal #8), by protecting important habitats for amphibians that are threatened or in danger of becoming threatened (subgoal #8).



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3. The proposed changes to general permit 27 (N.J.A.C. 7:7A-5.27(c) and (d)) will decrease loss of wetlands (subgoal #1), and will help preserve open space (subgoal #8).

### Federal Standards Analysis

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. Such a comparison is especially appropriate in the case of the freshwater wetlands program rules, because the Department is also obligated under Federal law to ensure that its program is at least as stringent as the Federal 404 program.

The changes proposed to general permit 6 will ensure that the general permit is as stringent as the U.S. Army Corps of Engineers (ACOE) Nationwide Permits (NWP) 29, 39, and 42. Each of these NWPs authorizes  $\frac{1}{2}$  acre of disturbance of a water of the United States. The proposal reduces the acreage of disturbance under general permit 6 to one half acre in waters of the United States, making the general permit match the corresponding Federal provision.

The prohibition on the use of general permits in vernal habitats, at proposed N.J.A.C. 7:7A-4.3(b)16, is more stringent than the corresponding Federal provisions. There are two types of special area protections that apply under the ACOE regulations: protections for threatened or endangered species habitat, and restrictions under general condition 25 against the use of certain NWPs in "critical resource waters," which include outstanding national resource waters (in New Jersey, this includes FW1 and Pinelands waters), wild and scenic rivers, State natural heritage sites, coral reefs, and others.

Only some of the vernal habitats protected by the proposed provision would be protected under the ACOE provisions for special areas. General condition 25 does not provide a high level of protection in New Jersey because New Jersey has few areas covered by general condition 25 except FW1 waters and Pinelands waters. While some vernal habitats are threatened or endangered species habitat, many are not and would thus not be protected by the ACOE. Thus, the proposed prohibition on use of general permits in vernal habitats will provide a greater level of protection than provided under the corresponding Federal provisions. This greater protection is justified by recent research revealing the importance of vernal habitats, and the intense development pressure in New Jersey.

General permit 27 authorizes up to one acre of disturbance of freshwater wetlands, State open waters, and/or transition areas for redevelopment of a significantly degraded area. There is no equivalent NWP, but some of the disturbances authorized under general permit 27 could be authorized under NWPs 29, 39, and 42, which authorize construction of a single family home; construction of a residential, commercial or institutional development; and construction of a recreational facility, respectively. Each

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of these NWPs authorizes ½ acre of disturbance. In addition, some activities authorized under general permit 27 could be authorized under NWP 18 which allows 1/10 acre of disturbance for minor discharges, and/or under NWP 38 for cleanup of hazardous and toxic sites (some but not all previously developed sites contain hazardous contamination). For hazardous sites, the NWP allows unlimited acreage, but restricts activities to cleanups, which is only a part of a redevelopment project. By reducing the acreage of disturbance under general permit 27 to one half acre in waters of the United States, the changes proposed to general permit 27 will ensure that the general permit is as stringent as these corresponding NWPs.

#### Jobs Impact

The Department does not anticipate that the proposed changes will have any noticeable effect on employment. While the changes are likely to slightly reduce the amount of development that will take place in wetlands, this development is likely to be relocated to upland areas. Thus, the Department believes that the impact of these proposed amendments on employment will be negligible.

#### Agriculture Industry Impact

The proposed amendments will affect development activities only and are not likely to have any measurable effect on agriculture.

#### Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that, although these amendments will not affect a large number of persons, a significant number of those builders and property owners that may be affected by the proposed amendments are "small businesses" as defined by the Regulatory Flexibility Act. The FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity. It is impossible for the Department to estimate the exact number of small businesses that own property that will be affected by the proposed amendments.

The Department has determined that the proposed amendments will not impose additional reporting or recordkeeping requirements on small businesses. While the proposed amendments may impose some additional compliance requirements on small businesses along with the rest of the regulated community, the rules regulate based on environmental impacts and will generally have the same impact on a small business as on any other person. Because the values and functions of wetlands are important to all persons, and these proposed amendments are necessary to maintain appropriate

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freshwater wetlands protection and to retain assumption of the Federal 404 program, no lesser requirements for small businesses are provided.

Full text of the proposed amendments follows (additions indicated in boldface thus; deletions indicated in brackets [thus]).

## SUBCHAPTER 4 GENERAL PROVISIONS FOR GENERAL PERMITS

### 7:7A-4.3 Conditions that apply to all general permit authorizations

(a) No change.

(b) The following conditions apply to all activities conducted under the authority of a general permit:

1. – 13. No change.
14. If the general permit activities are subject to the Department's Water Quality Management Planning rules at N.J.A.C. 7:15, the activities shall be consistent with those rules and with the applicable approved Water Quality Management Plan (208 Plan) adopted under the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.; [and]
15. The timing requirements at (c) below shall be met ; and
16. Activities authorized under a general permit shall not take place in a vernal habitat, as defined at N.J.A.C. 7:7A-1.4, or in a transition area adjacent to a vernal habitat.

## SUBCHAPTER 5 ADOPTED GENERAL PERMITS

### 7:7A- 5.6 General permit 6 — Non-tributary wetlands

(a) No change.

(b) Activities under general permit 6 shall [not result in the loss or substantial modification of more than] be limited as follows:

1. The activities shall disturb no more than one acre of a freshwater wetland [, transition area,] and/or State open [waters.] water, which is not a water of the United States, as defined at N.J.A.C. 7:7A-1.4;
2. The activities shall disturb no more than one acre of a transition area; and
3. The activities shall disturb no more than one half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4.

(c) Activities under general permit 6 shall not take place in any of the following, nor in a transition area adjacent to the following:

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1. - 2. No change.
3. USEPA priority wetlands; or
4. A State open water that is larger than one acre[; or
5. A vernal habitat, as defined at N.J.A.C. 7:7A-1.4].

7:7A- 5.27 General permit 27— Redevelopment of previously disturbed areas

(a) - (b) (No change.)

(c) Activities under general permit 27 shall be limited as follows:

1. The activities shall disturb no more than one acre of a freshwater wetlands [, transition area,] and/or State open water [.] , which is a not a water of the United States, as defined at N.J.A.C. 7:7A-1.4;
2. The activities shall disturb no more than one acre of a transition area; and
3. The activities shall disturb no more than one half acre of a freshwater wetland and/or State open water, which is a water of the United States, as defined at N.J.A.C. 7:7A-1.4. [However, this acre does not count toward the one acre allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2.]

(d) (No change.)

(e) A disturbance authorized under general permit 27 does not count toward the one acre of disturbance allowed under multiple general permits under N.J.A.C. 7:7A-4.4(a)2.

(e) Recodify as (f), no change in text.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994) (p. 9), permit the public to understand accurately and plainly the purpose and expected consequences of these proposed amendments, I hereby authorize this proposal.

\_\_\_\_\_  
Date

\_\_\_\_\_  
ROBERT C. SHINN, JR.  
Commissioner